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No. 99-1720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

v.

TROY A. ASHMUS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND BRIEF IN OPPOSITION

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Pursuant to United States Supreme Court Rule 39, Respondent Troy A. Ashmus ("respondent") hereby respectfully seeks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs, and to proceed in this matter *in forma pauperis*.

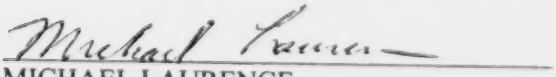
Respondent is an inmate in the California State Prison at San Quentin. Based on respondent's indigence, the United States District Court for the Northern District of California ("district court") granted respondent's request for appointment of counsel with respect to his federal Petition for Writ of Habeas Corpus on December 1, 1993. On August 9, 1995, the district court appointed Michael Laurence and Jean R. Sternberg as respondent's counsel of record pursuant to 21 U.S.C. § 848(q). On April 9, 1999, after Mr. Laurence and Ms. Sternberg became employed by the Habeas Corpus Resource Center, the district court appointed the Habeas Corpus Resource Center as counsel of record.

Because the district court appointed counsel for respondent under 21 U.S.C. § 848(q), and pursuant to Supreme Court Rule 39.1, this motion for leave to proceed *in forma pauperis* is not accompanied by an affidavit or declaration.

Dated: June 22 2000.

Respectfully submitted,

MICHAEL LAURENCE
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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude – as has every federal district court in the forty-six habeas proceedings to resolve the issue – that the State of California was not entitled to the expedited provisions contained in Chapter 154 of the Antiterrorism and Effective Death Penalty Act (AEDPA), because at least until 1998, when California Rule of Court 76.6 was promulgated, the State failed to fulfill the plain requirements of those provisions?

   A. Whether, prior to the 1998 adoption of Rule 76.6, the State had established, by "statute" or "rule of its court of last resort," a mechanism for the appointment of counsel in capital postconviction cases, as required by 28 U.S.C. § 2265(a)?

   B. Whether, prior to the 1998 adoption of Rule 76.6, the State had established, by "statute" or "rule of its court of last resort," standards of competency for collateral counsel as required by 28 U.S.C. § 2265(a)?

2. Did the Court of Appeals properly exercise its discretion in declining to certify questions to the state supreme court where those questions were neither determinative of the underlying petition for writ of habeas corpus nor determinative of the federal question to be resolved by the Court of Appeals?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Troy A. Ashmus ("Mr. Ashmus") respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") filed by petitioner Jeanne S. Woodford ("Warden"). The Warden has presented no compelling reasons why this Court should review the decision of the United States Court of Appeals for the Ninth Circuit in *Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000), *as amended*, 2000 WL 256627 (9th Cir. Mar. 9, 2000), Appendix to the Petition for Writ of Certiorari ("Pet. App.") 1a-22a . *See* Sup. Ct. R. 10.

STATUTES AND RULES INVOLVED

The following relevant provisions of California law were not included in the Warden's appendix, and are therefore reproduced in the Appendix attached to this Brief in Opposition ("Resp. App."): (1) Cal. Const. art. VI, § 14 (West 1996), Resp. App. 1a; (2) Cal. Gov't Code §§ 68661, 68662, 68665 (West Supp. 2000) Resp. App. 2a-5a; and (3) Cal. R. Ct.: Introduction, Rule 29.5, Rule 76.6 (West Supp. 2000), Resp. App. 6a-11a. The attached Appendix also includes the Senate Analysis of Senate Bill 513 (Cal. 1997), Resp. App. 16a-20a.

STATEMENT OF THE CASE

On March 4, 1987, the California Supreme Court appointed counsel to represent respondent Troy A. Ashmus in his "automatic appeal" from the death judgment imposed by the San Mateo County Superior Court. The California Supreme Court affirmed Mr. Ashmus' conviction and sentence on December 5, 1991. *People v. Ashmus*, 54 Cal.3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 112 (1991), *cert. denied*, 506 U.S. 841 (1992).[1] The orders specify that counsel were appointed to represent Mr. Ashmus in the automatic appeal to the California Supreme Court and do not refer to habeas proceedings or extend the appointment in the automatic appeal to include the investigation and presentation of habeas claims. Appellate counsel never filed a state habeas petition on Mr. Ashmus' behalf.

Following this Court's denial of certiorari, Mr. Ashmus instituted habeas proceedings in the United States District Court on February 17, 1993, by filing a request for the appointment of counsel and a stay of execution. The District Court appointed habeas counsel for Mr. Ashmus on December 1, 1993.

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[1] While Mr. Ashmus' rehearing petition was pending, on July 27, 1992, the California Supreme Court appointed an associate counsel in the automatic appeal.

On April 24, 1996, while the proceedings were pending in the District Court, President Clinton signed the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (1996), amending provisions in Chapter 153 and creating a new Chapter 154 of the Judicial Code. 28 U.S.C. §§ 2261-2266.[2] After the enactment of the AEDPA, Mr. Ashmus commenced a separate class action lawsuit on behalf of all California death-sentenced prisoners, seeking an expeditious, uniform determination of whether California qualified for Chapter 154's benefits. The District Court enjoined State officials from attempting to secure the benefits of Chapter 154 procedures, and the Ninth Circuit affirmed. *See Ashmus v. Calderon*, 935 F. Supp. 1048, 1054-56 (N.D. Cal. 1996), *aff'd*, 123 F.3d 1199 (9th Cir. 1997). While denying the State officials' petition for writ of certiorari on the underlying merits of whether California's procedures comport with the requirements of Chapter 154, *Calderon v. Ashmus*, 522 U.S. 104 (1997), this Court ultimately reversed the Ninth Circuit, concluding that the action for declaratory judgment failed to fulfill the "case or controversy" requirement. *Calderon v. Ashmus*, 523 U.S. 740 (1998). In that decision, this Court held that the question of whether a State meets the requirements of Chapter 154 must be resolved in individual federal habeas proceedings. *Id.* at 748.

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[2] Under Chapter 154, death-sentenced prisoners in qualifying states have a period of limitations of six months following termination of state proceedings to file a federal habeas petition. 28 U.S.C. § 2263. The state may insist that the case be advanced to the front of the federal court docket, with the district court required to process and decide the case within six months of the filing of the habeas petition, and the Court of Appeals required to hear and render a decision in the case within 120 days of the filing of respondent's brief or the appellant's reply brief, whichever is later. *See* 28 U.S.C. §§ 2263(a), 2266(b)(1)(A), 2266(c)(1)(A). In addition, the provision restricts a federal court's review of the merits of constitutional claims and authority to conduct an evidentiary hearing, 28 U.S.C. § 2264, and the habeas petitioner's ability to amend a petition, 28 U.S.C. § 2266(b)(3)(B).

Thereafter, the Warden filed a motion in the District Court seeking a determination that Chapter 154 applied to this habeas proceeding.[3] In urging the District Court to apply Chapter 154, the Warden repeated the arguments that both the Court of Appeals and the District Court had rejected in the class action litigation. *See Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1183-84 (N.D. Cal. 1998), Pet. App. 57a-58a. After receiving extensive briefing and oral argument, the District

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[3] The Warden filed nearly identical motions in numerous other capital habeas cases pending in the district courts. In forty-six cases, the district courts resolved the issue prior to the Ninth Circuit's decision in this case. In *every* case, the district court concluded that California does not qualify for Chapter 154's benefits. *Osband v. Calderon*, No. CIV-F-97-152 (E.D. Cal. Dec. 19, 1999); *Mitcham v. Calderon*, No. CV-97-3825 (N.D. Cal. Dec. 10, 1999); *Massie v. Calderon*, No. CV-99-2861 (N.D. Cal. Oct. 25, 1999); *Duncan v. Calderon*, No. CV-92-1403 (C.D. Cal. Sept. 30, 1999); *Mayfield v. Calderon*, No. CV 97-3742 (C.D. Cal. Sep. 10, 1999); *Wrest v. Calderon*, No. CV 95-0214 (C.D. Cal. Aug. 23, 1999); *Mattson v. Calderon*, No. CV 91-5453 (C.D. Cal. Aug. 13, 1999); *Livaditis v. Calderon*, No. CV 96-2833 (C.D. Cal. Aug. 12, 1999); *Sims v. Calderon*, No. CV 95-5267 (C.D. Cal. July 13, 1999); *Frye v. Calderon*, No. CIV S-99-0628 (E.D. Cal. June 21, 1999); *Wharton v. Calderon*, No. CV 92-3469 (C.D. Cal. June 15, 1999); *Carpenter v. Calderon*, No. C-98-2444 (N.D. Cal. June 14, 1999); *Cain v. Calderon*, No. CV 96-2584 (C.D. Cal. June 7, 1999); *Espinoza v. Calderon*, No. CIV S-94-1665 (E.D. Cal. May 24, 1999); *(Willie) Johnson v. Calderon*, No. CV 98-4043 (N.D. Cal. May 18, 1999); *Bacigalupo v. Calderon*, No. CV 94-2761 (N.D. Cal. May 12, 1999); *Alvarez v. Calderon*, No. CIV S-97-1895 (E.D. Cal. May 12, 1999); *Hawkins v. Calderon*, No. CIV S-96-1155 (E.D. Cal. May 10, 1999); *Reno v. Calderon*, No. CV 96-2768 (C.D. Cal. May 7, 1999); *DeSantis v. Calderon*, No. CIV S-93-1083 (E.D. Cal. Apr. 14, 1999); *Howard v. Calderon*, No. CIV F-93-5726 (E.D. Cal. Apr. 13, 1999); *McPeters v. Calderon*, No. CV F-95-5108 (E.D. Cal. Apr. 13, 1999); *Turner v. Calderon*, No. CIV-F-91-153 (E.D. Cal. Apr. 13, 1999); *Kirkpatrick v. Calderon*, No. CV 96-0351 (C.D. Cal. Apr. 9, 1999); *Zapien v. Calderon*, No. CV 94-1455 (C.D. Cal. Apr. 8, 1999); *Benson v. Calderon*, No. CV 94-5363 (C.D. Cal. Mar. 31, 1999); *(Noel) Jackson v. Calderon*, No. CV 97-3531 (C.D. Cal. Mar. 31, 1999); *Mickey v. Calderon*, No. C-93-0243 (N.D. Cal. Mar. 23, 1999); *Medina v. Calderon*, No. CV 94-1892 (C.D. Cal., Mar. 17, 1999); *Cummings v. Calderon*, No. CV 95-7118 (C.D. Cal. Mar. 11, 1999); *Cox v. Calderon*, No. CV 92-3370 (C.D. Cal. Mar. 11, 1999); *Bittaker v. Calderon*, No. CV 91-1643 (C.D. Cal. Feb. 17, 1999); *Proctor v. Calderon*, No. CIV S-96-1401 (E.D. Cal. Jan. 20, 1999); *Fudge v. Calderon*, No. CV 95-5369 (C.D. Cal. Jan. 6, 1999); *Crittenden v. Calderon*, No. CIV S-97-0602 (E.D. Cal. Dec. 31, 1998); *Ashmus v. Calderon*, 31 F. Supp. 2d 1175 (N.D. Cal. Dec. 24, 1998); *Montiel v. Calderon*, No. CIV F-96-5412 (E.D. Cal. Dec. 21, 1998); *Garceau v. Calderon*, No. CIV F-95-5363 (E.D. Cal. Dec. 21, 1998); *Webster v. Calderon*, No. S-93-0306 (E.D. Cal. Dec. 18, 1998); *Ross v. Calderon*, No. CV 96-2720 (C.D. Cal. Dec. 17, 1998); *Berryman v. Calderon*, CIV F-95-5309 (E.D. Cal. Dec. 15, 1998), *Ben-Sholom v. Calderon*, No. CIV F-93-5531 (E.D. Cal. Dec. 15, 1998); *Holt v. Calderon*, No. CIV F-97-6210 (E.D. Cal. Dec. 15, 1998); *Sanchez v. Calderon*, No. CIV F-97-6134 (E.D. Cal. Dec. 15, 1998); *Stankewitz v. Calderon*, No. CIV-F-91-0616 (E.D. Cal. Dec. 15, 1998); *Morris v. Calderon*, No. CIV S-92-0483 (E.D. Cal. Dec. 2, 1998).

Court issued a comprehensive order, in which it again concluded that California did not satisfy the requirements of Chapter 154 during the time period relevant to Mr. Ashmus' case. *Id.* at 1193, Pet. App. 78a.

The District Court based this decision on four separate grounds: (1) the State did not provide for any competency standards for habeas counsel in a statute or "rule of court of last resort," *id.* at 1190-93, Pet. App. 71a-78a; (2) even if the guidelines relied on by the Warden did constitute "rule[s] of court of last resort," they did not impose binding or mandatory competency standards, *id.* at 1187-88, Pet. App. 65a-66a; (3) the State did not have an adequate mechanism for compensating counsel for the investigation and presentation of collateral habeas claims, *id.* at 1188-90, Pet. App. 67a-71a; and (4) the State has not made a bona fide offer of counsel because, although counsel has been offered to habeas petitioners, counsel has not been timely appointed, *id.* at 1186-87, Pet. App. 62a-65a; *see also Ashmus*, 935 F. Supp. at 1070-75 (same); *Ashmus v. Calderon*, 123 F.3d 1199, 1207-08 (9th Cir. 1997) (same).

In order to resolve the Chapter 154 issue for Mr. Ashmus and the other similarly situated habeas petitioners in California district courts, Mr. Ashmus stipulated to the certification of the District Court's Order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). On appeal, the Ninth Circuit again affirmed the District Court, holding that "[d]uring all times relevant to this appeal, and at least until 1998, California failed to establish 'by rule of its court of last resort or by statute' a mechanism for appointment and compensation of collateral counsel for its death-sentenced prisoners. California also failed to provide mandatory and binding standards of competency for collateral counsel in a 'rule of court or statute.'" *Ashmus v. Woodford*, 202 F.3d 1160, 1170 (9th Cir. 2000), *as amended*, 2000 WL 256627 (9th Cir. Mar. 9, 2000), Pet. App. 22a. [4]

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[4] The Court of Appeals declined to rule on the other grounds cited by the District Court because the "conclusion that the State's attempt to opt-in suffers from two fatal

Following the issuance of the unanimous panel decision, the Warden sought rehearing and rehearing en banc. On March 9, 2000, the three-judge panel issued an order amending the original opinion and denying the Warden's rehearing petition. In denying the petition for rehearing en banc, the Court stated that "no judge of the court has requested a vote on the petition for rehearing en banc." *Ashmus v. Calderon*, ___ F.3d ___, 2000 WL 256627 (9th Cir. Mar. 9, 2000), Pet. App. 4a.

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deficiencies . . . makes it unnecessary to rule on these additional issues." 202 F.3d at 1165 n.8, Pet. App. 12a-13a.

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF ARGUMENT

The provisions of Chapter 154 unambiguously offer certain procedural advantages to the States in federal capital habeas corpus proceedings only if the States first meet explicit prerequisites. These explicit prerequisites include the States' adoption of a "statute" or "rule of its court of last resort" that establishes a mechanism for the appointment of counsel in state postconviction proceedings. 28 U.S.C. § 2265(a), Pet. App. 81a. In addition, "[t]he rule of court or statute must provide standards of competency for the appointment of such counsel." *Id.* The provisions of section 2265(a) – and parallel provisions in section 2261(b) – consistently have been read to mean what they say, i.e., that a qualifying mechanism *must* be established by a statute or a rule of court, that itself contains mandatory and enforceable competency standards. *See, e.g., Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997); *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.), *cert. denied*, 519 U.S. 1002 (1996).

California did not undertake to comply with the provisions of section 2265(a) until 1998, two years after enactment of the AEDPA and section 2265(a). In that year, the State Legislature created the Habeas Corpus Resource Center and enacted California Government Code section 68662, requiring the state supreme court "to offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings." Resp. App. 4a. Pursuant to Government Code section 68665, the Legislature required the State Judicial Council and the California Supreme Court to "adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings." Resp. App. 5a. In turn, the Judicial Council and the California Supreme Court adopted California Rule of Court 76.6, which became effective on February 27,

1998. Resp. App. 11a. The Warden concedes that at least prior to the adoption of Rule 76.6, California had no statute or rule of court that contained mandatory, enforceable standards for the appointment of postconviction counsel in capital cases. *See Ashmus*, 31 F. Supp. 2d at 1192, Pet. App. 76a. In fact, the Warden cannot cite *any* pre-1998 statute or rule of court that contains any form of standard – whether enforceable, wholly discretionary or otherwise – governing the appointment of counsel in postconviction capital case proceedings.

A plain reading of the terms of section 2265(a) in light of (1) the date that California first attempted to adopt a qualifying statute and court rule, and (2) the Warden's acknowledged inability to cite any pre-existing qualifying court rule or statute, reasonably should preclude any question that the Court of Appeals correctly determined that California did not comply with the requirements of section 2265(a) at least before 1998. The Warden, however, attempts to avoid this inevitable result by raising two *faux* certiorari questions.

First, the Warden represents that this case presents the question whether Chapter 154 requires states to adopt standards for the appointment of counsel "that allow no exceptions, no opportunity for departure, and no occasion for state courts to inform the application of those standards with any discretionary considerations." Petition at i, 17. Contrary to the Warden's suggestion, the Court of Appeals did not read section 2265(a) as containing any such rigid conditions. Rather, the Court of Appeals held that the appointment standards must be "binding and mandatory" provisions of a state statute or court rule, as opposed to mere "hortatory" language in policy statements that state courts are free to disregard when appointing counsel in capital cases. *Ashmus*, 202 F.3d at 1167-68, Pet. App. 17a-19a. The Warden expressly concedes that "[o]ne can plausibly read Chapter 154, as the Fifth Circuit apparently did [in *Mata v. Johnson*, 99 F.3d at 1267 & n.13], to require 'binding and mandatory' standards in the limited sense that those standards must be 'explicit' and *have the force of law*. *Id.*" Petition at 20 n.9

(Warden's emphasis). The only difference between the Ninth Circuit's reading of section 2265(a) as requiring "binding and mandatory" appointment standards and the Fifth Circuit's concededly "plausibl[e]" reading of the same requirement is the Warden's hyperbolic characterization of the former that is calculated to alarm this Court into believing there is a need to grant certiorari review.

The Warden's second ground for seeking certiorari review is premised on the belief that disputes over whether a state has qualified for expedited, Chapter 154 procedures in *federal* court present *state law* questions that should be certified to state courts for resolution. Petition at i, 26-27. The contention is directly at odds with the settled principles that federal courts are responsible for determining compliance with federal statutes, and for determining whether state procedures were sufficiently established and applied to warrant circumscribing the scope of review available to habeas corpus petitioners in federal court. *See e.g., Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). Moreover, the Warden never explicitly articulates the question(s) that this Court should order the Court of Appeals to certify to the California Supreme Court, nor explains how the answer to any potential question would determine an issue in this case.

The Warden may mean to suggest that the Ninth Circuit should be directed to inquire of the California Supreme Court whether the standards for the appointment of counsel in death penalty cases that were recommended by the State Judicial Council in Section 20(c) of the Standards of Judicial Administration were ever adopted as part of a rule of court prior to 1998. *See* Petition at 10, 27-28. It is a matter of public record, however, that this question indisputably must be answered in the negative.

The Judicial Council expressly explained that the appointment standards listed in Section 20 were part of non-binding *recommendations* made pursuant to the Council's constitutional authority to "make recommendations to the courts," as distinct from its further constitutional

authority to "adopt rules for court administration." Introductory Statement, Cal. Court Rules, Vol. 23, pt. 1 at 4 (West 1996), Resp. App. 6a. The recommended standards did not appear in any rule, statement of policy or directive relating to the appointment of counsel in postconviction proceedings prior to 1998. As described above, that was the year that the California Judicial Council and the California Supreme Court promulgated Rule 76.6 in response to the State Legislature's mandate to adopt "binding and mandatory competency standards for the appointment of counsel in . . . habeas corpus proceedings." Cal. Gov't Code § 68665, Resp. App. 5a. That was the first time the Judicial Council's recommendations were elevated to the status of a rule, and made applicable to the appointment of counsel in capital postconviction proceedings.

Indeed, the Warden concedes that the state judiciary's official announcement "of rule 76.6's adoption" explained that it incorporated and expanded "the standards *previously embodied in section 20(c) of the Standards of Judicial Administration.*"[5] Petition at 24 n.10 (Warden's emphasis). Thus, if the standards had been "embodied" in an existing court rule, or if any other court rule already provided standards for the appointment of counsel in capital postconviction proceedings, it would have been unnecessary for the California Supreme Court and the Judicial Council to promulgate Rule 76.6 in order to satisfy the legislative mandate.

Under these circumstances, the effect of certifying the Warden's apparent question would be to ask the California Supreme Court if it is *still certain* that, prior to the adoption of Rule 76.6,

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[5] Nor is it true, as the Warden represents to this Court, that the standards in Section 20 "were promulgated pursuant to California Rule of Court 76.5." Petition at 4. The text of Rule 76.5, subsections (b) and (d) makes it clear that Section 20 already was in existence at the time Rule 76.5 was adopted. Pet. App. 84a-85a. Moreover, subsections (b) and (d) also make it clear that Rule 76.5 itself applies only to counsel appointed to handle direct appeals – not postconviction proceedings – in the intermediate state appellate courts, rather than the state supreme court which has original jurisdiction over capital postconviction proceedings. *See Ashmus*, 202 F.3d at 1167 & n. 12, Pet. App. 16a.

the appointment standards were embodied only in the Section 20 recommendations of the Judicial Council; or whether the 1998 adoption of Rule 76.6 was superfluous. The Court of Appeals correctly concluded that California's certified question procedure surely was not designed for such unnecessary queries.

Equally important is the fact that the Warden does not explain how any question she might chose to articulate would satisfy the requirement that "the questions may be determinative of a cause pending in the certifying court." Cal. Rules of Court, Rule 29.5(a)(2), Resp. App. 8a. Resolution of any questions regarding the applicability of Chapter 154 would not determine the "cause pending" as that phrase is understood to mean the underlying habeas corpus proceedings. Nor would any of the Warden's apparent questions, Petition at 26-28, determine the applicability of Chapter 154 to this case.

The Warden has given no reason to burden the California Supreme Court by eliciting its view of the same analysis, particularly where, as here, the answers to any imaginable questions could not determine either the cause or even an issue in the case.

ARGUMENT

I.

THE COURT OF APPEALS' INTERPRETATION OF CHAPTER 154 IS FULLY CONSISTENT WITH OTHER COURTS' INTERPRETATIONS OF THE PROVISION AND ANY READING OF CALIFORNIA'S PURPORTED MECHANISM FOR COMPLYING WITH CHAPTER 154.

The Court of Appeals concluded that prior to 1998, California failed to meet the prerequisites of Chapter 154 in three major respects:

1. At least until the adoption of California Rule of Court 76.6 in 1998, the State had no "statute" or "rule of court" that "establishes" a mechanism for appointing and compensating counsel in postconviction proceedings as required by 28 U.S.C. section 2265(a), Pet. App. 81a;

2. At least until the adoption of Rule 76.6, the State could not satisfy the requirement in section 2265(a), Pet. App. 81a, that a "rule of court or statute must provide standards of competency for the appointment" of postconviction counsel; and

3. At least until the adoption of Rule 76.6, the State had no binding or mandatory competency standards governing the appointment of counsel in capital postconviction proceedings as also required by section 2265(a), Pet. App. 81a.

Ashmus, 202 F.3d at 1165-70, Pet. App. 11a-22a.

In so holding, the Court of Appeals rejected the Warden's arguments that section "2265(a) does not actually require the appointment mechanism to be embodied in a rule of court or statute, as long as the mechanism is 'accomplished' by rule of court or statute." *Ashmus*, 202 F.3d at 1167, Pet. App. 15a. The Court of Appeals also rejected the Warden's arguments "that a qualifying state's competency standards need not be contained in a rule of court or statute," and

that the requirements of section 2265(a) may be satisfied by non-binding recommendations for counsel competency standards. *Ashmus*, 202 F.3d at 1169, Pet. App. 20a-21a.

The Court of Appeals' holding rested on a straightforward reading of Chapter 154 and the plethora of California provisions that the Warden offered in an attempt to piece together a qualifying mechanism.[6] In turn, the Court of Appeals' analysis is supported by *every* reported decision to interpret the requirements of Chapter 154, including the comprehensive analysis by the Court of Appeals in *Ashmus*, 123 F.3d 1199, as well as the district court orders in each of the forty-six capital habeas corpus cases finding that Chapter 154 does not apply to California cases.

A. CERTIORARI IS UNWARRANTED TO REVIEW THE COURT OF APPEALS' CORRECT INTERPRETATION OF THE CHAPTER 154 REQUIREMENTS

The Warden criticizes the Court of Appeals for interpreting Chapter 154 as requiring that the State's qualifying mechanism be contained in either a "statute" or "rule of its court of last resort," that the competency standards actually be contained in a rule or statute, and that such standards be "binding and mandatory." Petition at 17. The Warden cannot cite any case that conflicts with the Court of Appeals' plain reading of the statute. Nor does the Warden even acknowledge the settled principle of statutory construction that where, as here, the language of the statute is unambiguous, there is no reason to attempt to discern a contrary Congressional intent. *See Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 475 (1992) ("when a statute

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[6] The Warden proffered ten disparate provisions sprinkled through California statutes, court rules, policy statements, and guidelines. More than half of these provisions pre-dated 1989, i.e., at a time when the Warden already has conceded that California did not qualify as a Chapter 154 jurisdiction. *Ashmus*, 202 F.3d at 1165, Pet. App. 12a; *see Ainsworth v. Calderon*, 138 F.3d 787, 790, *amended by* 152 F.3d 1223 (9th Cir. 1998); *McDowell v. Calderon*, 107 F.3d 1351, 1355 n. 1, *amended by* 116 F.3d 364, *vacated in part on other grounds on reh'g en banc*, 130 F.3d 833 (9th Cir. 1997), *cert. denied*, 523 U.S. 1103 (1998). As to the only four post-1989 provisions proffered by the Warden in this case, all four were internal policy and procedure guidelines of the state court, and *none* of them even *mentioned* standards for the appointment of postconviction counsel.

speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished"). Yet, even if there were some arguable ambiguity in the prerequisites set forth in section 2265(a), the Warden's reading of the statute is clearly contrary to Congress' intent and the federal courts' consistent reading of Chapter 154.

In enacting Chapter 154, Congress conferred substantial procedural benefits upon qualifying States "*only if* the State meets certain conditions," designed to ensure that the state has "done its part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage." *Lindh v. Murphy*, 521 U.S. 320, 327, 331 (1996) (emphasis added); *see also Calderon v. Ashmus*, 523 U.S. at 723 ("If a State meets these criteria, then it may invoke Chapter 154"); *Moore v. Reynolds*, 153 F.3d 1086, 1095 (10th Cir. 1998) ("only if it satisfies the requirements" is a state entitled to the procedures in Chapter 154), *cert. denied*, 526 U.S. 1025 (1999). As the legislative history of Chapter 154 illustrates, the statute establishes a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants." House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R. Rep. No. 104-23, at 16 ("House Report"); *see also* 135 Cong. Rec. S13471-04, S13481 (Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report, Aug. 23, 1989 (Oct. 16, 1989)) ("Powell Committee Report").

The Congressional intent to condition Chapter 154 procedures on an enforceable right to competent counsel in state postconviction proceedings is reflected in the plain language of the statute that requires that a state's competency standards actually *be* a rule of court or statute. *Ashmus*, 202 F.3d at 1167-70, Pet. App. 17a-21a. Thus, this is the reading of the statutory language given by *every* reported decision interpreting the requirement of Chapter 154. *See, e.g., Mata v. Johnson*, 99 F.3d at 1267; *Mills v. Anderson*, 961 F. Supp. 198, 202 (S.D. Ohio 1997)

(Ohio Supreme Court Rule 65 reference to certification of counsel is insufficient for Chapter 154 compliance, as the Rule does not itself contain minimum qualifications for counsel in postconviction proceedings); *Bennett v. Angelone*, 92 F.3d at 1342 (quoting H.R. Rep. No. 23, 104th Cong., 1st. Sess.) (qualifying as a Chapter 154 jurisdiction requires a state to guarantee an enforceable "*right to counsel* for indigent capital defendants" in state postconviction proceedings) (emphasis added); *Wright v. Angelone*, 944 F. Supp. 460, 468 (E.D. Va. 1996) (right to post conviction counsel must be guaranteed by an explicit statute or a "rule of court" that establishes "a clear mechanism that can be seen and relied upon by indigent capital defendants, rather than a loose collection of statutes and regulations which lack binding enforcement mechanisms and which may be subject to differing interpretations."); *Zuern v. Tate*, 938 F. Supp. 468, 471 (S.D. Ohio 1996) ("The Ohio process does not provide by statute or rule of the Supreme Court 'standards of competency for the appointment of [postconviction] counsel'"); *Austin v. Bell*, 927 F. Supp. 1058, 1061-62 (M.D. Tenn. 1996) ("Although Tennessee law provides for the appointment of counsel for indigent prisoners seeking habeas relief, this law insufficiently ensures the competency of such counsel.").

The Warden's criticism of the Court of Appeals' interpretation that Chapter 154 requires binding and mandatory competency standards similarly is flawed. Every federal court to consider the question has recognized that at a minimum, for a State to qualify for the expedited provisions in Chapter 154, the State must actually have enforceable rules that ensure the appointment and compensation of qualified counsel. *See Ashmus*, 123 F.3d at 1208; *Tucker v. Moore*, 56 F. Supp. 2d 611, 614 (D. S.C. 1999) (State may not invoke Chapter 154 if it fails to follow procedures set forth in qualifying mechanism); *Hill v. Butterworth*, 941 F. Supp. 1129 (N.D. Fla. 1996), *rev'd for lack of a case or controversy*, 147 F.3d 1333 (11th Cir. 1998). Because the requisite mechanism for the appointment of counsel is intended "to *ensure* that *only*

qualified, competent counsel will be appointed to represent habeas petitioners in capital cases." *Austin v. Bell*, 927 F. Supp. at 1061-62 (emphasis added), the rule of court or statute must provide "*specific*, *mandatory* standards for capital habeas counsel." *Mata v. Johnson*, 99 F.3d at 1267 (emphasis added).

Owing to the important purposes underlying Chapter 154, and the conditional nature of its central exchange, a state seeking to qualify for the benefits of Chapter 154 bears the burden of demonstrating compliance with each of the statutory requirements. *See Langford v. Day*, 110 F.3d 1380, 1386 n.2 (9th Cir. 1996) (holding Chapter 154's provisions do not apply to Montana because it did not prove it met its statutory obligations), *cert. denied*, 522 U.S. 881 (1997). Because of the severity of Chapter 154's restraints on federal review, a state satisfies the requirements of Chapter 154 only by showing strict compliance with those requirements. *See Ashmus*, 31 F. Supp. 2d at 1183, Pet. App. 56a ("the language of the qualifying procedures and the quid pro quo structure of Chapter 154 demand strict rather than substantial compliance with all preconditions"); *Weeks v. Angelone*, 4 F. Supp. 2d 497, 507 (E.D. Va. 1998) (compensation requirement only "satisfied by strict, rather than substantial compliance"); *Mills v. Anderson*, 961 F. Supp. at 201 ("neither substantial compliance nor de facto compliance is sufficient."); *Scott v. Anderson*, 958 F. Supp. 330, 332 (N.D. Ohio 1997) (same); *Breard v. Netherland*, 949 F. Supp. 1255, 1262 (E.D. Va. 1996) ("'substantial compliance' with the Act's requirements is not sufficient"), *aff'd*, 134 F.3d 615 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

In short, the Warden offers no legal support for her view that the Court of Appeals improperly interpreted Chapter 154's requirements. Given that the Court of Appeals' interpretation of Chapter 154 mirrors that of every other federal court, this case presents no reason for certiorari review.

B. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT CALIFORNIA DID NOT ESTABLISH THE REQUIRED MECHANISM BY "STATUTE" OR "RULE OF COURT" UNTIL 1998 AT THE EARLIEST

Certiorari similarly is unwarranted for this Court to review the application of Chapter 154 to the California appointment process. The actions of the California Legislature, the California State Supreme Court and the Judicial Council in mandating and adopting new Rule of Court 76.6 demonstrate that, prior to 1998, California lacked a qualifying mechanism. The legislative history of Senate Bill 513 reflects the State Legislature's acknowledgment that a qualifying mechanism was absent, and the legislative steps designed to comply with the prerequisites for Chapter 154 benefits. *See* 1997 Cal. Legis. Serv. 869 (Senate Bill 513); *see also* SB 513 Senate Analysis, Resp. App. 16a (noting that the bill "[p]rovides for legal representation of indigent death row inmates to reduce the backlog of capital cases and to begin to comply with federal requirements for expedited federal habeas corpus procedures"), Resp. App. 19a (same). Pursuant to Chapter 2.1, which was added to the California Government Code, effective January 1, 1998, the Legislature created the "California Habeas Resource Center" for the purpose, *inter alia*, of providing representation to death-sentenced prisoners in "instituting and prosecuting postconviction actions in the state and federal courts." Cal. Gov't Code § 68661(a) (West Supp. 2000), Resp. App. 2a. The Legislature also mandated that "[t]he Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings," Cal. Gov't Code § 68662 (West Supp. 2000), Resp. App. 4a. In turn, the Legislature mandated that: "The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings." Cal. Gov't Code § 68665 (West Supp. 2000), Resp. App. 5a.

In response to this last enactment, the California Judicial Council and the California Supreme Court adopted new Rule of Court 76.6, effective February 27, 1998, entitled "Qualifications of Counsel in Death Penalty Appeals and Habeas Corpus Proceedings." Cal. R. Ct. 76.6, Resp. App. 11a. The provisions of new California Government Code section 68665 and new Rule of Court 76.6 constitute the first and only state statute and rule of court to provide for standards of competency for counsel appointed in capital postconviction proceedings.

The recently promulgated statutes and court rule necessarily demonstrate that, at least prior to February 27, 1998, California had not complied with the prerequisites for Chapter 154 benefits. *Cf. Gill v. Villagomez*, 140 F.3d 833, 836 (9th Cir. 1998) ("the fact that California had to amend the statute to provide a speedy trial right on remand indicates the right did not exist under" earlier versions of the statute); *see also In re Lance W.*, 37 Cal.3d 873, 887, 694 P.2d 744, 753, 210 Cal. Rptr. 631, 640 (1985) ("[t]he general rule is that courts assume from a new enactment a purpose to change existing law"); *People v. Mobley*, 72 Cal. App. 4th 761, 85 Cal. Rptr. 2d 474, 488 (Cal. Ct. App. 1999) ("[w]e presume the Legislature in amending a law 'is deemed to be aware of statutes and judicial decisions already in effect and to have enacted the new [version] in light thereof'").

1. The State Of California Had No Mechanism Created By Statute Or Rule Of Court For The Appointment Of Counsel In Habeas Proceedings Prior To 1998.

The Court of Appeals rejected the Warden's suggestion that the appointment policies outlined in the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death ("Policies") and Internal Operating Practices and Procedures ("IOPP") satisfied the clear prerequisites of section 2265(a): "Neither of these authorities is a rule of court or statute. The 1989 Supreme Court Policies, as the name suggests, are policies – not rules of court or statutes. So, too, with the IOPPs." *Ashmus*, 202 F.3d at 1165-66, Pet. App. 13a-14a.

Yet, even if these policies could be deemed to qualify as rules or statutes, they would still fail to satisfy section 2265(a) in two other major respects. First, neither the Policies nor the IOPP contain, mention, or even allude to competency standards for the appointment of counsel. Thus, irrespective of the status accorded these policy statements, they would still fail to meet the basic requirement to "*provide* standards of competency," as any qualifying rule or statute "*must*" do. 28 U.S.C. § 2265(a), Pet. App. 81a (emphasis added). Second, the Policies and IOPP are fatally contradictory on the questions of whether and when the state court would actually appoint postconviction counsel to represent a capital prisoner during the state "unitary" proceedings that prevailed in California between 1989 and 1998. *See* Petition at 3, n.1; 24, n. 10. The paradigm Congress had in mind for such jurisdictions requires the appointment and compensation of postconviction counsel "in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings." 28 U.S.C. § 2265(a), Pet. App. 81a. By contrast, the state court IOPP – even as revised after the announcement of the 1989 Policies and the enactment of Chapter 154 – did not authorize the appointment and compensation of postconviction counsel until *after* the termination of the capital appeal:

> In criminal matters, upon a verified or certified statement of indigency, the court, acting through the clerk's office, will appoint an attorney for a party in the following instances: . . . . In capital cases in the following proceedings undertaken *after the termination of the party's state appeal*: Proceedings in this court for *post-conviction* review.

IOPP, revised December 1989 (emphasis added); *see also* IOPP, revised 1995; IOPP, revised April 29, 1997.[7] Thus, putting aside the complete failure of the Polices and the IOPP even to

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[7] As revised as recently as April 29, 1997, Section XV of the IOPP stated that the court would appoint counsel for indigent defendants "[i]n capital cases in the following proceedings undertaken *after the termination of the party's state appeal*: (a) Proceedings in this court for *post-conviction* review." Following the 1998 adoption of the new Government Code Chapter 2.1 and pending adoption of new Rule of Court 76.6, the IOPP was revised to strike the foregoing language and to state that counsel would be appointed, "[i]n a pending automatic

mention competency standards, the Warden cannot seriously suggest the State created a Chapter 154 qualifying mechanism based on "rules" that simultaneously mandated the unitary processing of direct appeal and postconviction claims, but withheld appointment of postconviction counsel until the completion of the direct appeal.

The irreconcilable conflict between the Policies and the IOPP on this point is, of course, attributable to the fact that prior to 1998 neither set of administrative procedures was promulgated – nor even revised – with an eye toward complying with Chapter 154. Indeed, all of the provisions the Warden relies upon were initially adopted years before the AEDPA. These various state law provisions are merely "a loose collection of statutes and regulations which lack binding enforcement mechanisms and which may be subject to differing interpretations," *Wright*, 944 F. Supp. at 468, which the Warden ineffectively has attempted to meld into a *post hoc* mechanism to comply with Chapter 154.

The Warden does not explain what purpose would be served by granting certiorari to determine the *status* of the state court policies, when the *substance* of the policies clearly fails to satisfy the requirements of section 2265(a).

2. The State of California Had No Qualifying Competency Standards Prior to 1998

The only appointment standards the Warden can find in all of the proffered state provisions are those appearing in Section 20. The Warden, however, also has conceded that Section 20 is a "mere recommendation rather than a statute or rule of court." *Ashmus*, 31 F. Supp. 2d at 1192, Pet. App. 76a. Taking the Warden at her word, the Court of Appeals logically held that "the nonbinding nature of the competency standards [in Section 20] does not satisfy Chapter 154." *Ashmus*, 123 F.2d at 1208; *see also Ashmus*, 31 F. Supp. 2d at 1190 & n.29, Pet.

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appeal *and/or related state habeas corpus/executive clemency proceeding*" (emphasis added).

App. 71a-72a (adopting previous analysis that Section 20 lacks binding and mandatory standards); *Ashmus*, 935 F. Supp. at 1072-74 (discussing in detail the reasons why Section 20 does not impose any binding or mandatory standards).

The Warden appears to argue that the precatory recommendations in Section 20 are sufficient because Congress intended to afford states "wide latitude" in formulating the appointment mechanism. Petition at 21-25. The Warden's reliance on legislative history in support of her claims that Congress intended that States "retain considerable 'latitude' to fashion qualifying standards" is misplaced. Petition at 21-22 (citing 137 Cong. Rec. S3220). The *Congressional Record* section-by-section analysis referring to "latitude" afforded to the states specifically is limited to "defining specific standards of counsel competence," and does not allow states the latitude to disregard altogether the requirement of competency standards. 137 Cong. Rec. S3191-02, S3220.

Similarly, the Court of Appeals made it clear that its holding does not constrain the State's prerogatives in fashioning specific competency standards. The Court of Appeals' only concern is that, as Congress demanded, the standards must be "mandatory" rather than "hortatory." *Ashmus*, 202 F.3d at 1169 n. 18, Pet. App. 20a. Because Section 20 is a nonbinding recommendation, and "courts are *not obligated to comply* with these recommendations," Cal. R. Ct. at 1 (West 1999), Resp. App. 6a (emphasis added), it cannot satisfy the requirement that states "must have and 'apply' competency standards." *Ashmus*, 202 F.3d at 1168 n. 14, Pet. App. 18a (citing *Oken v. Nuth*, 30 F. Supp. 2d 877, 880 n. 3 (D. Md. 1998)).

The Warden's proffer of concededly inadequate and inapposite state policies serves only to underscore the point that at no time prior to the 1998 adoption of new Rule 76.6 did California provide standards of competency for the appointment of capital postconviction counsel as required by section 2265(a).

II.

THE COURT OF APPEALS PROPERLY DECLINED TO CERTIFY QUESTIONS TO THE STATE SUPREME COURT

The Warden seeks certiorari review by this Court of the question "[w]hether the court of appeals erred by failing to certify disputed state-law questions to the state supreme court." Petition at i. Yet nowhere in the Petition does the Warden identify the "disputed state law questions" that the state supreme court allegedly improperly failed to certify. The Warden's Question Presented on this issue merely states generally that the Court of Appeals erred in failing to certify certain unidentified questions to the state supreme court. *Id.* The Warden's "Statement" identifies some – but not all – of the questions as to which the Warden sought certification in her two motions below, but does not identify which of those she believes Court of Appeals improperly failed to certify. *Id.* at 10, 16. Even the Warden's argument fails to identify which questions the Warden believes the Court of Appeals should have certified to the state supreme court.[8]

The Warden's complete failure to specify the questions that she believes should have been -- and, in the future, should be – certified to the state supreme court both impedes Mr. Ashmus' ability to address this issue and obscures whatever remedy the Warden may be seeking from this Court. For this reason alone, certiorari should be denied as to the Warden's second Question Presented.

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[8] *See* Petition at 18 (Court of Appeals should be "reminded" on remand to "avail itself" of the state's certification process as to "all provisions of state law relevant to the determination of California's compliance with Chapter 154"); Petition at 26-29 (identifying what the Warden claims to be three erroneous "conclusions of California law" relied on by the court of appeals – the second of which the Warden did not even seek to certify below – but failing to identify the *questions* that should have been certified to the state supreme court).

Moreover, the Warden cannot justify this Court's review of her second question for the additional reasons that (1) the Court of Appeals, in interpreting the *federal* AEDPA statute, would not have been assisted by state court interpretations of state law; and (2) the state law questions the Warden sought to certify below were not appropriate for certification even under state rules of court, in that (a) they were neither determinative of the underlying petition for writ of habeas corpus, nor determinative of the federal question to be resolved by the Court of Appeals, and (b) they have already been decided by controlling state precedent. Because engaging in the certification process thus would have unnecessarily delayed the proceedings – already substantially delayed by the Warden's litigation and relitigation of the Chapter 154 issue – the Court of Appeals properly declined to certify the Warden's proposed questions to the state supreme court, and certiorari should be denied as to this issue.

A. A FEDERAL COURT PROPERLY EXERCISES ITS DISCRETION TO DECLINE TO CERTIFY QUESTIONS OF LAW TO A STATE COURT WHERE THE QUESTION TO BE DETERMINED BY THE FEDERAL COURT IS ONE OF FEDERAL LAW.

Certification of questions of state law to the highest courts of the states is not "obligatory," and "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).[9] The Warden's argument that the Court of Appeals abused that discretion in declining to certify certain unspecified questions to the state supreme court ignores

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[9] In determining whether to certify a question to a state court, the federal court "must consider an inevitable side effect of certification – delay." *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275-76 (5th Cir.) (also noting that where "[o]ver two and one-half years already have passed since the filing of this complaint and many preliminary questions are yet to be resolved . . . delay that is not absolutely necessary should be avoided"), *cert. denied*, 425 U.S. 829 (1976); *see also Matter of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (the "certifying court also should consider the possible delays involved"). Even if the questions posed by the Warden were appropriate for certification, the delay that would result from such a procedure is unnecessary – especially in light of the numerous opinions that uniformly reach the same conclusions as the Court of Appeals below – and militates against certification.

the basic principle that the interpretation of a federal statute, such as Chapter 154, presents a *federal* question properly decided by federal courts. *See Ashmus*, 202 F.3d at 1164 n. 6, Pet. App. 10a ("the question before this court is whether California is entitled to 'opt-in' to Chapter 154; this is manifestly a question of federal statutory interpretation").

The related issue of whether purported state rules may properly circumscribe the federally-mandated rights of federal habeas corpus petitioners is likewise a federal question to be decided by federal courts. *Cf. Johnson v. Mississippi*, 486 U.S. at 587 ("'[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question'") (quoting *Henry v. Mississippi*, 379 U.S. 443, 447 (1965)); *Ford v. Georgia*, 498 U.S. 411, 422 (1991) (whether a state procedural rule bars federal review of petitioner's claim is a federal question).[10]

As the Court of Appeals held below, this Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), relied on by the Warden to support her claim that the Court of Appeals abused its discretion in declining to certify questions to the state supreme court, is inapposite. *Ashmus*, 202 F.3d at 1164 n. 6, Pet. App. 11a. In *Arizonans*, the court of appeals was charged with interpreting a *state* constitutional provision and determining whether that provision was invalid under the First Amendment of United States Constitution. *Arizonans*, 520 U.S. at 43. In that situation, "[w]hen anticipatory relief is sought in federal court *against a state statute*, respect for the place of the States in our federal system calls for close consideration of that core question." *Id.* at 75 (emphasis added); *see also id.* at 79 ("[w]arnings against premature

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[10] The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, whose report was largely codified in the AEDPA, acknowledged that "[t]he final judgments as to the adequacy of any system for the appointment of counsel . . . rests ultimately with the federal judiciary." Powell Committee Report, 45 Crim. L. Rep. (BNA) at 3242; *see also Ashmus*, 935 F. Supp. at 1057 and n.8 ("Congress . . . has entrusted to the federal judiciary the responsibility and obligation for determining whether Chapter 154 applies to a given state").

adjudication of constitutional questions bear heightened attention *when a federal court is asked to invalidate a State's law*") (emphasis added).

In contrast, the Court of Appeals in this case was charged with interpreting a *federal* statute. At issue below was not the validity of the state standards, policies, and guidelines relied on by the Warden, or even an interpretation of those standards, policies and guidelines, but rather whether those standards, policies and guidelines *as promulgated* met the *federal* statutory requirements for California to receive the benefit of certain procedural advantages afforded by *federal* statute. The deference to state court decision-makers in interpreting state law called for in *Arizonans* thus is not only unwarranted, but patently inappropriate, in this case. *Cf. State of Florida ex rel Shevin v. Exxon*, 526 F.2d at 275 (in a "pure federal question case in which state law happens to be relevant in determining the issue of standing," considerations of "federal-state comity" are rendered "somewhat less persuasive").

B. THE COURT OF APPEALS PROPERLY REFUSED THE WARDEN'S ATTEMPT TO FURTHER DELAY THE PROCEEDINGS THROUGH A LENGTHY CERTIFICATION PROCESS WHERE THE WARDEN HAS DEMONSTRATED NO VALID REASON TO CERTIFY ANY PROPOSED QUESTION TO STATE COURT.

The Warden has failed to identify a single state law question, an answer to which by the state supreme court would have assisted the Court of Appeals in determining the *federal* question of whether the requirements of Chapter 154 may be applied to Mr. Ashmus' habeas petition in this case. Nor do any of the certified questions proposed by the Warden below meet the state supreme court's criteria for accepting certified questions, which require that "the questions may be determinative of a cause pending in the certifying court," and that "the decisions of the California appellate courts provide no controlling precedent concerning the certified question." Cal. R. Ct. 29.5(a), Resp. App. 8a.

As a threshold matter, as noted above, the Warden does not identify in her petition the questions she believes should have been – and, in the future, should be – certified to the state supreme court.[11] In her argument regarding her second question presented, the Warden does list three "conclusions of California law" that she claims were relied on erroneously by the Court of Appeals in reaching its decision below: (1) "[t]he California Supreme Court's Death Penalty Polices and IOPPs are not 'rules' of that court"; (2) "Rule 76.5 and § 68511.5 do not 'contemplate' appointment of collateral counsel by the California Supreme Court in capital cases"[12]; and (3) "[n]otwithstanding the California Supreme Court's demonstrated 'use' of the

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[11] In her initial Motion to Certify Questions of State Law to the California Supreme Court, the Warden sought certification of the following questions: "1. Whether any or all of the following state law measures have been adopted as 'rules of court' pursuant to California Government Code section 68070 or any other provision of law: (a) Section 20 of the Standards of Judicial Administration, (b) the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death, and (c) the Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court. 2. Whether the Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court violate California Penal Code section 1241." The Court of Appeals concluded that "Questions (1)(c) and (2) are no longer relevant to this appeal because we do not address the question whether California's unitary review scheme compensates collateral counsel for 'reasonable litigation expenses.'" *Ashmus*, 202 F.3d at 1164 n.6, Pet. App. 10a. The Court of Appeals declined to certify questions (1)(a) and (1)(b) because resolution of those questions would not be determinative of the cause pending before the Court of Appeal, and because they were not "novel" questions. *Id.*

In her Second Motion to Certify Questions of State Law to the California Supreme Court – filed after the Court of Appeals issued its opinion – the Warden sought certification of the following questions: "1. Whether, from 1989 to 1998, the California Supreme Court's 1989 Death Penalty Policies and IOPP constituted the exclusive sources of that Court's mechanism for the appointment of collateral counsel in capital cases. . . . 2. Whether either the Policies or the IOPP are rules of the California Supreme Court. 3. Whether Section 20 of the Standards of Judicial Administration is, or is provided by, a rule of court or statute." The Court of Appeals denied this motion without comment. Pet. App. 23a.

[12] The Warden did not seek certification by the Court of Appeals of the question of whether Rule 76.5 and Section 68511.5 contemplate appointment of collateral counsel by the California Supreme Court in capital cases. *See supra* note 11. Therefore, the Court of Appeals did not err in failing to certify this question.

Section 20 standards, the court never adopted those standards, or, if it did adopt them, it did not do so pursuant to § 68070 or any other provision of state law that would permit their adoption as rules." Petition at 26-28. Assuming that these three legal "conclusions" frame the questions as to which the Warden seeks certification, the Warden has failed to show that certification was, or is, appropriate as to these questions.

1. The Questions Of State Law That The Warden Seeks to Certify to the State Supreme Court Are Not Determinative of a Cause Pending Below.

The "cause pending" in this case, for purposes of California Rule of Court 29.5(a)(2), is Mr. Ashmus' federal petition for writ of habeas corpus.[13] Because none of the questions as to which the Warden sought certification below – all of which related to the Chapter 154 issue – would have resolved the claims of federal constitutional violations raised in Mr. Ashmus' underlying habeas corpus petition, certification was not appropriate as to *any* of these questions. *See* Cal. R. Ct. 29.5(a)(2), Resp. App. 8a (certification only proper where "the questions may be determinative of a *cause pending* in the certifying court") (emphasis added); *see also* Cal. R. Ct. 29.5(f)(2), Resp. App. 9a (in considering whether to accept request for answer to certified question, California Supreme Court may consider whether answering the question will "help terminate existing litigation").

Yet, even if the question of Chapter 154's applicability in California were deemed to be the "cause pending" for purposes of California Rule of Court 29.5(a), the certified questions

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[13] Both the California Supreme Court and the California Constitution equate "cause" with an action or proceeding, which is, in this case, Mr. Ashmus' federal habeas petition. *Cf. People v. Romero*, 8 Cal. 4th 728, 740, 883 P.2d 388, 35 Cal. Rptr. 2d 270 (1994) (the function of a writ of habeas corpus or an order to show cause in a state habeas proceeding is to "institute a proceeding in which issues of fact are to be framed and decided"; and thus the issuance of the writ or order to show cause "creates a 'cause,' thereby triggering the state constitutional requirement that the cause be resolved 'in writing with reasons stated'") (quoting Cal. Const. art. VI, § 14, Resp. App. 1a).

proposed below (and apparently proposed here) by the Warden would have been inappropriate for certification, because the state supreme court's answers to those questions would not have been determinative of that "cause."

(a) Whether the California Supreme Court considers the "standards," "policies," and "guidelines" invoked by the Warden to be "rules of court" is not determinative of whether those formulations qualify as "rules" for purposes of Chapter 154.

The Warden apparently contends that the Court of Appeals should have certified to the state supreme court the questions of whether that court considers the California Supreme Court Death Penalty Policies, IOPP, and Section 20 standards, to be "rules of court." Petition at 26-28. This argument misses the point of certification. Whether or not the California Supreme Court deems the "standards," "policies," and "guidelines" invoked by the Warden to be "rules" under *state* law, such a determination simply is not relevant to the *federal* question to be decided by this Court: whether those formulations qualify as "rules" for purposes of Chapter 154. As Mr. Ashmus explains in detail in Section I, *supra*, a state court's mere labeling of non-binding, evolving, and scattered standards, policies, and guidelines as "rules" will not bring the state under the purview of Chapter 154, and the Warden's misguided yet persistent effort to conjure a coherent "rule" from those standards, policies, and guidelines is nothing more than "post hoc rationalization." *Ashmus*, 31 F. Supp. 2d at 1189, Pet. App. 70a-71a.

(b) The California Supreme Court's interpretation of its Death Penalty Policies, IOPP, Rule 76.5, and Section 68511.5, is irrelevant to the question of whether, during the relevant period, California provided binding and mandatory standards for the appointment of collateral counsel.

State court conclusions that the California Supreme Court Death Penalty Policies and IOPP are "rules of court," and that Rule 76.5 and Section 68511.5 "contemplate" appointment of collateral counsel by the California Supreme Court in capital cases, would have had no bearing

on the cause pending below for the additional reason that the Court of Appeals' determination that California does not qualify under Chapter 154 was limited to the grounds that California (1) "failed to establish 'by rule of its court of last resort or by statute' a mechanism for appointment and compensation of collateral counsel for its death-sentenced prisoners," *and* (2) "*failed to provide mandatory and binding standards of competency for collateral counsel in a 'rule of court or statute.*'" *Ashmus*, 202 F.3d at 1170, Pet. App. 22a (9th Cir. Mar. 9, 2000) (emphasis added). Since none of the Policies or IOPP, nor Rule 76.5, nor Section 68511.5, contains standards of competency for the appointment of counsel, and since the Warden was "forced to concede" below that Section 20 "is a mere recommendation rather than a statute or rule of court," *Ashmus*, 31 F. Supp. 2d at 1192, Pet. App. 76a, both a state court opinion that these provisions constituted "rules of court," and a state court opinion that Rule 76.5 and Section 68511.5 "contemplate" appointment of collateral counsel by the California Supreme Court in capital cases, would have been irrelevant to the Court of Appeals' decision.

(c) The proposed certified questions would not be determinative of the cause pending because regardless of whether appropriate standards were eventually adopted, *in this case* counsel was not appointed, under *any* standards, to represent Mr. Ashmus in habeas corpus proceedings during the pendency of his direct appeal.

The Warden conceded that the earliest date that California satisfied the Chapter 154 prerequisites was June 6, 1989, when the state supreme court announced its Policies Regarding Cases Arising from Judgments of Death. Petition at 3, n.1. Mr. Ashmus' state court counsel were appointed only to handle Mr. Ashmus' direct appeal in March 1987, over two years *before* the Policies were announced. As the state supreme court acknowledged, "[t]he Policies did, *for the first time*, impose an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus." *In re Clark*, 5 Cal.4th 750, 783, 855 P.2d 729 (1993) (emphasis added). Irrespective of whatever appointment standards the Warden may

believe governed the appointment of habeas corpus counsel at the earliest alleged compliance date of June *1989*, it is clear that such standards could not qualify California for Chapter 154 status when Mr. Ashmus' counsel were appointed to handle only the direct appeal in *1987*.

Additionally, despite the Warden's critique of virtually every aspect of the Court of Appeals' decision, she does not dispute the finding that after the state court's announcement of its 1989 Policies, Mr. Ashmus' state-appointed appeal counsel "never received orders to investigate collateral claims." *Ashmus*, 202 F.3d at 1162, Pet. App. 6a. Indeed, the state supreme court acknowledged in *Clark* that the Polices were a source of confusion regarding the nature and extent of appellate counsel's habeas corpus investigative duties. The state court sought to correct the problem by amending the Polices contemporaneously with the filing of the 1993 decision. *In re Clark*, 5 Cal.4th at 785 n.21. Accordingly, the Warden cannot show that counsel was appointed, under any standards, to represent Mr. Ashmus in habeas corpus proceedings at any time from the appointment of direct appeal counsel in 1987 until the state court affirmed Mr. Ashmus' death sentence on direct appeal in 1991.

2. The Questions Of State Law That The Warden Seeks to Certify to the State Supreme Court Have Already Been Decided By Controlling State Precedent.

The Warden's proposed questions fail to meet the standards for certification not only because they are not determinative of the cause pending below, but also because they already have been answered by controlling state precedent. *See* Cal. R. Ct. 29.5(a)(3), Resp. App. 8a (certification proper only where "the decisions of the California appellate courts provide no controlling precedent concerning the certified question"); *see also Arizonans*, 520 U.S. at 76 (certification appropriate for "novel or unsettled questions of state law"); *Lehman Bros.*, 416 U.S. at 391 (same).

By virtue of their very titles, their exclusion from the Rules of Court, and their non-binding nature, the standards, policies and guidelines relied upon by the Warden were, upon their promulgation, deemed *not* to be "rules." As the District Court observed, "California explicitly distinguishes between its rules of court and its guidelines, policies, practices, recommendations, and standards." *Ashmus*, 31 F. Supp. 2d at 1191, Pet. App. 74a; *see also id.* at 1190, n.30, Pet. App. 72a (same); *id.* at 1192, Pet. App. 76a (the Introductory Statement to the California Standards of Judicial Administration "specifically differentiates between rules of court which 'have the force of law,' and standards such as section 20, which are described as 'nonmandatory . . . recommendations on practice and procedure [expressing] goals that courts and judges are urged to try to attain, and stat[ing] guidelines for discretionary action'").

Moreover, the previous conclusions by the District Court and Court of Appeals that Section 20 is not a rule of court were confirmed in 1998 when the California Supreme Court adopted California Rule of Court 76.6. Newly enacted Government Code Section 68665 mandated that the California Supreme Court promulgate a rule of court setting forth binding and mandatory competency standards for counsel appointed in capital appeals and habeas proceedings. Resp. App. 5a. In response to this statute, the California Supreme Court did not inform the California legislature that Section 20 and/or Rule 76.5 satisfied the legislative mandate; nor did the state supreme court promulgate an additional section in the Standards of Judicial Administration Recommended by the Judicial Council (of which Section 20 is a part), which the state supreme court surely would have done if it considered Section 20 to be a "rule." Instead, the California Supreme Court and the Judicial Council promulgated *Rule of Court* 76.6. A comparison of Rule 76.6, Resp. App. 11a, with the text of Rule 76.5, Pet. App. 84a, confirms the state court's acknowledgment that until the adoption of Rule 76.6 in 1998, California had *no* rule providing standards for the appointment of counsel in capital postconviction cases.

Because the California authorities that promulgated the standards, policies and guidelines relied upon by the Warden made clear – through the act of promulgation – that they are *not* rules of court, the Court of Appeals did not abuse its discretion in declining to certify the Warden's proposed questions to the California Supreme Court.

CONCLUSION

Petitioner has failed to establish grounds for this Court to review the Circuit Court's decision. The petition for writ of certiorari should be denied.

Dated: June 23, 2000

Respectfully submitted,

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No. 99-1720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

v.

TROY A. ASHMUS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX A

WEST'S ANNOTATED CALIFORNIA CODES
CONSTITUTION OF THE STATE OF CALIFORNIA 1879
ARTICLE VI. JUDICIAL

§ 14. Publication of opinions; decisions of Supreme Court and courts of appeal

Sec. 14. The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

APPENDIX B

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2.3. CALIFORNIA HABEAS RESOURCE CENTER

§ 68661. California Habeas Corpus Resource Center; creation; powers and duties

There is hereby created in the judicial branch of state government the California Habeas Corpus Resource Center, which shall have all of the following general powers and duties:

(a) To employ up to 30 attorneys who may be appointed by the Supreme Court to represent any person convicted and sentenced to death in this state, who is without counsel and who is determined by a court of competent jurisdiction to be indigent, for the purpose of instituting and prosecuting postconviction actions in the state and federal courts, challenging the legality of the judgment or sentence imposed against that person, and preparing petitions for executive clemency. Any such appointment may be concurrent with the appointment of the State Public Defender or other counsel for purposes of direct appeal under Section 11 of Article VI of the California Constitution.

(b) To seek reimbursement for representation and expenses pursuant to Section 3006A of Title 18 of the United States Code when providing representation to indigent persons in the federal courts and process those payments via the Federal Trust Fund.

(c) To work with the Supreme Court in recruiting members of the private bar to accept death penalty habeas case appointments.

(d) To establish and periodically update a roster of attorneys qualified as counsel in postconviction proceedings in capital cases.

(e) To establish and periodically update a roster of experienced investigators and experts who are qualified to assist counsel in postconviction proceedings in capital cases.

(f) To employ investigators and experts as staff to provide services to appointed counsel upon request of counsel, provided that where the provision of those services is to private counsel under appointment by the Supreme Court, those services shall be pursuant to contract between appointed counsel and the center.

(g) To provide legal or other advice or, to the extent not otherwise available, any other assistance to appointed counsel in postconviction proceedings as is appropriate where not prohibited by law.

(h) To develop a brief bank of pleadings and related materials on significant, recurring issues which arise in postconviction proceedings in capital cases and to make those briefs available to appointed counsel.

(i) To evaluate cases and recommend assignment by the court of appropriate attorneys.

(j) To provide assistance and case progress monitoring as needed.

(k) To timely review case billings and recommend compensation of members of the private bar to the court.

(l) The center shall annually report to the Legislature, the Governor, and the Supreme Court on the status of the appointment of counsel for indigent prisoners in postconviction capital cases, and on the operations of the office. On or before January 1, 2000, the office of the Legislative Analyst shall evaluate the available reports.

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2.3. CALIFORNIA HABEAS RESOURCE CENTER

§ 68662. State prisoners subject to capital sentences; appointment of counsel for postconviction proceedings

The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:

(a) The appointment of one or more counsel to represent the prisoner in postconviction state proceedings upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.

(b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.

(c) The denial to appoint counsel upon a finding that the person is not indigent.

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2.3. CALIFORNIA HABEAS RESOURCE CENTER

§ 68665. Appointment of counsel; binding and mandatory competency standards

The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings.

APPENDIX C

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT

INTRODUCTORY STATEMENT

[Adopted effective Jan. 1, 1992.]

The Judicial Council is established under article VI, section 6, of the Constitution of California, and is given various powers and responsibilities to improve the administration of justice.

Judicial Council rules, standards, and orders

Unless otherwise indicated, each rule in these California Rules of Court was adopted by the Judicial Council under its constitutional authority to "adopt rules for court administration, practice and procedure not inconsistent with statute," or under express authority granted by the Legislature.

Throughout the rules, "shall" is mandatory, "may" is permissive, and "should" indicates a nonbinding recommendation unless the context or subject matter requires otherwise.

All of the California Rules of Court have the force of law.

Under its authority granted by article VI, section 6, of the Constitution to "make recommendations to the courts," the Judicial Council has adopted "Standards of Judicial Administration Recommended by the Judicial Council" ("standards"). They are published in Division I of the Appendix to the California Rules of Court.

The nonmandatory nature of the standards is indicated by the use of "should" instead of the mandatory "shall."

Standards make recommendations on practice and procedure, express goals that courts and judges are urged to try to attain, and state guidelines for discretionary action. Even though courts are not obligated to comply with these recommendations, goals, and guidelines, courts should consider them as highly desirable standards of good practice.

A standard might also be found by a court to state the proper boundaries of judicial discretion.

The Judicial Council sometimes disposes of matters within its jurisdiction by orders that are not incorporated into the rules; for example, it might name the counties to participate in a pilot project by order.

The Chief Justice, as Chair of the Judicial Council, is given certain express powers by article VI, section 6, and by statute. For example, article VI, section 6, authorizes the Chief Justice to prescribe the reports courts make to the Judicial Council. This is done by regulations, which have the force of law.

This Introductory Statement is intended to clarify the usual meaning and intent of rules, standards, and orders, and to distinguish among them. It is not intended to be exhaustive or exclusive, and the distinctions expressed here do not bind the Judicial Council in the future.

Judicial Council forms

The Judicial Council may adopt forms in either of two ways.

Under Government Code section 68511, it may "prescribe" certain forms. Use of those forms is mandatory.

The council may also "approve" forms. Use of an approved form is not mandatory, but the form must be accepted by all courts in appropriate cases (rule 982(b)).

Forms thus are "adopted" for mandatory use and "approved" for optional use. The lower left corner of the first page of each form indicates whether the Judicial Council adopted or approved the form. Local rules of many courts make the use of some optional council forms mandatory in those courts.

A form adopted or approved by the council is not subject to the requirements of rules 201 and 501, which specify the format of papers filed in superior and municipal courts, respectively.

A party may file a "duplicate" of a council form produced entirely by computer (rule 982(e), (f)).

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
TITLE ONE. APPELLATE RULES
DIVISION I. RULES RELATING TO THE SUPREME COURT AND COURTS OF APPEAL
CHAPTER I. RULES ON APPEAL
PART IV. HEARING AND DETERMINATION OF APPEAL

Rule 29.5. Questions of state law certified by federal appellate courts and other courts

(a) [Requirements for certified questions] The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, provided that:

(1) the certifying court requests the answer;

(2) the questions may be determinative of a cause pending in the certifying court; and

(3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question.

(b) [Contents of certification request] Only a court specified in subdivision (a) may certify a question. The request shall be by an order that sets forth:

(1) the caption of the case, including names and addresses of counsel and of parties appearing pro se, and a designation of the party to be deemed the petitioner on the certified question if the request to answer is granted;

(2) the questions of law to be answered;

(3) a statement (by stipulation of the parties subject to approval by the certifying court, or by the court itself) of all facts relevant to the certified question, and showing fully the nature of the controversy and the circumstances in which the question arose;

(4) statements (i) demonstrating that the question certified is contested and that there is no controlling precedent in the case law of the California appellate courts; (ii) explaining how an authoritative answer to the certified question may be determinative of a cause pending in the certifying court; and (iii) indicating that the answer provided by the California Supreme Court will be followed by the certifying court; and

(5) such additional information as the certifying court may deem relevant and useful.

(c) [Briefs and other materials] The certifying court shall furnish legible copies of all relevant briefs to the California Supreme Court with the request for an answer to the certified question. The California Supreme Court may request that the certifying court furnish additional material, such as exhibits or all or a portion of the record that, in the opinion of the court, may be useful in answering the certified question.

(d) [Request procedure] The judge or justice presiding at the certification hearing (if any)--or the presiding judge or justice of the court or panel certifying the question--shall sign the request for an answer to the certified question. The clerk of the certifying court shall forward the request under its official seal to the California Supreme Court with a certificate that the clerk has served the request on the parties.

(e) [Supporting or opposing the request]

(1) Within 20 days after the request for an answer to a certified question is filed in the California Supreme Court, a party may file a brief supporting or opposing the request.

(2) The brief may request that the California Supreme Court restate the certified question under subdivision (g). If a brief makes that request, it shall state a proposed restatement of the question at the beginning of the body of the brief.

(3) The brief shall state on its cover whether the brief supports or opposes the request and whether it requests restatement of the question.

(4) A party may reply to another party's brief within 10 days after the brief is filed.

(5) A brief or reply shall be served on each party and on the requesting court.

(f) [Factors that may be considered] The California Supreme Court shall have discretion to accept or deny the request for an answer to the certified question of law. In exercising its discretion the court may consider:

(1) factors that it ordinarily considers in deciding whether to grant review of a decision of a California Court of Appeal or to issue an alternative writ or other order in an original matter;

(2) comity, and whether answering the question will facilitate the certifying court's functioning or help terminate existing litigation;

(3) the extent to which an answer would turn on questions of fact; and

(4) any other factors the court may deem appropriate.

(g) [Clarification of question] At any time, the California Supreme Court may restate the certified question or may ask the certifying court to restate or clarify the certified question.

(h) [Order denying or accepting request] The California Supreme Court shall issue an order accepting or denying the request for an answer to the certified question. If the court accepts the request, it shall announce that determination in the manner that it announces the acceptance of cases for review, and thereafter:

(1) the California Rules of Court for briefing, argument, and conduct of appeals shall

govern further proceedings on any certified question unless the court or the Judicial Council otherwise provides;

(2) fees and costs shall be the same as in appeals docketed before the California Supreme Court and, in civil matters, shall be equally divided between or among the parties unless the certifying court in its request for an answer to the certified question provides for a different allocation, or the California Supreme Court provides otherwise; and

(3) the California Supreme Court may in its discretion assign a certified question such priority on its docket as considerations of fairness, exigency, and comity may require.

(i) [Notice to California Attorney General] If the certified question concerns the proper interpretation of a California statute, in litigation in which the State of California or an officer, agency, or employee of the state is not a party, the clerk of the California Supreme Court shall notify the California Attorney General and the California Supreme Court may permit him or her to file briefs on the issue.

(j) [Transmission of opinion] The clerk shall forward the California Supreme Court's written opinion stating the law governing the certified question to the certifying court, under the seal of the Supreme Court, and also shall forward copies of the opinion to counsel of record.

(k) [Publication and precedential effect] The California Supreme Court's answer to a certified question shall have the same authoritative and precedential force as any other decision of the court, and shall be published in the Official Reports.

(l) [Procedural rules] The California Supreme Court or the Judicial Council may adopt procedures governing practice under this rule.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
TITLE ONE. APPELLATE RULES
DIVISION I. RULES RELATING TO THE SUPREME COURT AND COURTS OF APPEAL
CHAPTER IV. ADMINISTRATIVE PROVISIONS GOVERNING REVIEWING COURTS

Rule 76.6. Qualifications of counsel in death penalty appeals and habeas corpus proceedings

(a) [Purpose] The purpose of this rule is to define minimum qualifications for attorneys appointed to represent persons in the Supreme Court in death penalty appeals and habeas corpus proceedings related to sentences of death. An attorney is not entitled to appointment simply because the minimum qualifications are met.

(b) [General qualifications] The Supreme Court shall appoint an attorney only if, after reviewing the attorney's experience, writing samples, references, and evaluations as set forth in subdivisions (d) through (f), the court determines that the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant. An attorney appointed under this rule must be willing to cooperate with an assisting counsel or entity as may be designated by the court.

(c) [Definitions] The following definitions apply:

(1) "Appointed counsel" means an attorney appointed by the Supreme Court to represent a person in a death penalty appeal or death penalty related habeas corpus proceedings in the Supreme Court. Appointed counsel may be either lead counsel or associate counsel.

(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the California Habeas Resource Center, or the California Appellate Project, who is responsible for the overall conduct of the case and for supervising the work of associate and supervised counsel. Whenever more than one attorney is appointed to represent a defendant jointly in a death penalty appeal, in death penalty related habeas corpus proceedings in the Supreme Court, or in both classes of proceedings together, one such attorney shall be designated as lead counsel.

(3) "Associate counsel" means an attorney appointed by the Supreme Court who does not have the primary responsibility for the case. Associate counsel must meet the same minimum qualifications as lead counsel.

(4) "Supervised counsel" means an attorney who works under the immediate supervision and direction of lead or associate counsel, but is not appointed by the Supreme Court. Supervised counsel must be an active member of the State Bar of California.

(5) "Assisting counsel or entity" means an attorney or entity designated by the Supreme Court to provide outside consultation and resource assistance to appointed counsel. Entities that may be designated in this capacity include, as appropriate, the Office of

the State Public Defender, the California Habeas Resource Center, and the California Appellate Project.

(d) [Qualifications for appointed appellate counsel] An attorney appointed to represent a person in the Supreme Court in a death penalty appeal, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years;

(2) Either:

(A) Counsel of record for a defendant in seven completed felony appeals, including one murder; or

(B) Counsel of record for a defendant in five completed felony appeals and supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal shall apply toward the minimum qualification described in this subdivision (d)(2)(B) only if lead or associate counsel in that appeal attests that the supervised attorney has performed a significant portion of work on the case and recommends the attorney for appointment;

(3) Familiarity with the practices and procedures of the Supreme Court, including those specifically related to death penalty appeals;

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense training, continuing education, or course of study, at least six hours of which involve death penalty appeals. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement; and

(5) Proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration:

(A) Two writing samples, ordinarily appellate briefs, written by the attorney and involving analysis of complex legal issues;

(B) If the attorney has been appointed previously in a death penalty appeal or death penalty related habeas corpus proceeding in the Supreme Court, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(e) [Qualifications for appointed habeas corpus counsel] An attorney appointed to represent a person in the Supreme Court in death penalty related habeas corpus proceedings, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years;

(2) Either:

(A) Counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder, and counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or

(B) Counsel of record for a defendant in five completed felony appeals or writ proceedings and supervised counsel in two Supreme Court death penalty related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a Supreme Court death penalty related habeas corpus proceeding shall apply toward the minimum qualifications described in this subdivision (e)(2)(B) only if lead or associate counsel in that proceeding attests that the attorney has performed a significant portion of work on the case and recommends the attorney for appointment;

(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty habeas corpus proceedings;

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which involve death penalty habeas corpus proceedings. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement; and

(5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy, taking into consideration:

(A) Three writing samples, ordinarily two appellate briefs and one habeas corpus petition, written by the attorney and involving analysis of complex legal issues;

(B) If the attorney has been appointed previously in a death penalty appeal or death penalty related habeas corpus proceeding in the Supreme Court, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(f) [Alternative qualifications] The Supreme Court may appoint an attorney who does not meet the requirements of subdivisions (d)(1) and (d)(2) or (e)(1) and (e)(2) of this rule if the attorney has the qualifications described in subdivisions (d)(3) through (d)(5) or (e)(3) through (e)(5) and:

(1) The court finds that the attorney has extensive experience in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years, such that the attorney has substantially equivalent experience in complex cases as an attorney qualified under subdivision (d) or (e);

(2) Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court; and

(3) Within two years before appointment, the attorney has completed at least 18 hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least nine hours of which involve death penalty appellate or habeas corpus proceedings. The Supreme Court shall determine in each case whether the training, education, or course of study completed by a particular attorney satisfies the requirements of this subdivision in light of his or her individual background and experience. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement.

(g) [Attorneys without trial experience] If an attorney appointed under either subdivision (e) or subdivision (f) to represent a defendant in death penalty related habeas corpus proceedings in the Supreme Court does not have experience in conducting trials or evidentiary hearings, the attorney must associate an attorney who has such experience if an evidentiary hearing is ordered in the habeas corpus proceeding.

(h) [Use of supervised counsel] An attorney who does not meet the qualifications described in subdivisions (d), (e), or (f) may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

(i) [Dual appointment] An attorney appointed to represent a defendant in both a death penalty appeal and death penalty related habeas corpus proceedings in the Supreme Court must

meet the minimum qualifications of both subdivisions (d) and (e), or of subdivision (f). Notwithstanding the foregoing, two attorneys together may be eligible for appointment to represent a defendant jointly in both a death penalty appeal and death penalty related habeas corpus proceedings in the Supreme Court if the Supreme Court finds that their qualifications in the aggregate satisfy the provisions of both subdivisions (d) and (e), or of subdivision (f).

(j) [Designated entities as appointed counsel] Notwithstanding any other provision of this rule, the State Public Defender is qualified and eligible to serve as appointed counsel in death penalty appeals, the California Habeas Resource Center is qualified and eligible to serve as appointed counsel in death penalty related habeas corpus proceedings in the Supreme Court, and the California Appellate Project is qualified and eligible to serve as appointed counsel in both classes of proceedings. When serving as appointed counsel in a death penalty appeal, the State Public Defender or the California Appellate Project shall not assign any attorney as lead counsel in the appeal unless it finds the attorney has the qualifications described in subdivisions (d)(1) through (d)(5) or the Supreme Court finds the attorney to qualify under subdivision (f). When serving as appointed counsel in a death penalty related habeas corpus proceeding in the Supreme Court, the California Habeas Resource Center or the California Appellate Project shall not assign any attorney as lead counsel in the proceeding unless it finds the attorney has the qualifications described in subdivisions (e)(1) through (e)(5) or the Supreme Court finds the attorney to qualify under subdivision (f).

(k) [Attorney appointed by federal court] Notwithstanding any other provision of this rule, the Supreme Court may appoint an attorney who is under appointment by a federal court in a death penalty related habeas corpus proceeding for the purpose of exhausting state remedies in the Supreme Court and for all subsequent state proceedings in that case, if the Supreme Court finds the attorney has the commitment, proficiency and knowledge necessary to represent the defendant competently in state proceedings.

APPENDIX D

SENATE THIRD READING
SB 513 (Lockyer)
As Amended September 10, 197
Majority-vote

SENATE VOTE : Vote no relevant

PUBLIC SAFETY APPROPRIATIONS
Vote not relevant Vote not relevant

SUMMARY: Provides for legal representation of indigent death row inmates to reduce the backlog of capital cases and to begin to comply with federal requirements for expedited federal habeas corpus procedures. Specifically, this bill :
1) Creates the California Habeas Resource Center (center) in the Judicial Branch to represent indigent death row inmates in habeas corpus proceedings. In particular:

a) States that the center shall be managed by an executive director who shall be confirmed by the Senate and appointed by an unpaid board with a four-year term chosen by the five indigent appellate projects.

b) Provides that the executive director shall have the same qualifications as the State Public Defender - five years (minimum) membership in the State Bar and substantial experience in criminal defense;

c) Allows the center to employ up to 30 attorneys who may be appointed by the Supreme Court to represent capital defendants;

d) Authorizes employment of investigators for habeas petitions and hearings, and allows contracts with appointed private counsel for use of investigation services;

e) Authorizes the Supreme Court to raise allowable initial investigation expenses from $12,000 to $25,000 per case;

f) Directs the center to maintain a roster of qualified private attorneys for appointments in direct appeals and habeas petitions;

g) Directs the center to provide assistance to appointed attorneys and to review case billings submitted by private attorneys;

h) Authorizes the center to seek reimbursement from the federal courts for representation of capital habeas petitioners in federal courts.

2) Gives the California Supreme Court discretion to raise the hourly rate in capital appeals and habeas proceedings to at least $125 per allowable hour, based upon established guidelines for complexity of issue and length of record, but also allows the court to pay attorneys on a flat-fee basis (also based upon similar established guidelines).

3) Directs the Judicial Council, and the Supreme Court to establish binding qualifications for attorneys in capital cases.

4) Restricts appointments to the Office of the State Public Defender (OSPD) to direct appeals in capital cases, with exceptions for training or where capital duties have been met.

5) Authorizes the OSPD to hire an additional 15 attorneys and adequate support staff.

EXISTING LAW :

1) Provides, in Supreme Court standards, that the hourly payment to a private attorney appointed by the Court in a capital appeal or post-conviction proceeding is $98, or a fixed fee based upon expected usual or average allowable hours for comparable cases.

2) Authorizes the OSPD to represent a defendant in any appeal or proceeding after a sentence of death, a defendant in an appeal or extraordinary writ a state prison inmate charged with a crime when the local public defender has refused appointment, or any other defendant entitled to representation at public expense.

FISCAL EFFECT : Unknown

COMMENTS :

1) According to the author, "Currently, there are over 150 inmates on death row for whom no counsel has been appointed, either for purposes of the direct appeal or state habeas proceedings. Under existing law, the Office of the State Public Defender or private counsel recruited by the Supreme Court's Automatic Appeals Monitor are assigned death penalty cases. The State Public Defender is currently stretched as far as her budget will allow and many qualified private counsel are unwilling to accept new cases because of the low rate of compensation authorized by the Supreme Court."
2) The prior votes on this bill are not relevant as the entire contents of the bill has been deleted.

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SENATE RULES COMMITTEE
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SB 513

UNFINISHED BUSINESS

Bill No: SB 513
Author: Lockyer (D)
Amended: 9/10/97
Vote: 21

All Senate Votes Not Relevant

ASSEMBLY FLOOR : Not Available

SUBJECT : Appellate representation: California Habeas Resource Center

SOURCE : Author

DIGEST : This is a new bill. As it left the Senate, this bill, by Senator Hayden, made it unlawful to purchase more than one pistol, revolver, or other firearm capable of being concealed upon the person within any 30-day period, punishable by a misdemeanor penalty. The above provisions and the author were deleted in the Assembly.

Assembly Amendments provide for legal representation of indigent death row inmates. This bill would also create the California Habeas Resource Center to represent indigent death row inmates.

NOTE: This bill is essentially the same as the Conference Report on SB 1088 (Lockyer) to the issue of creating the California Habeas Resource Center. This version is essentially the same as that section in SB 1088, with technical amendments requested by the Governor.

ANALYSIS : Existing law provides, in Supreme Court standards, that the hourly payment to a private attorney appointed by the Court in a capital appeal or post-conviction proceeding is $98, or a fixed fee based upon expected usual or average allowable hours for comparable cases.

Existing law authorizes the OSPD to represent a defendant in any appeal or proceeding after a sentence of death, a

defendant in an appeal or extraordinary writ a state prison inmate charged with a crime when the local public defender has refused appointment, or any other defendant entitled to representation at public expense.

This bill provides for legal representation of indigent death row inmates to reduce the backlog of capital cases and to begin to comply with federal requirements for expedited federal habeas corpus procedures. Specifically, this bill:

1. Creates the California Habeas Resource Center (center) in the Judicial Branch to represent indigent death row inmates in habeas corpus proceedings. In particular:

   A. States that the center shall be managed by an executive director who shall be confirmed by the Senate and appointed by an unpaid board with a four-year term chosen by the five indigent appellate projects.

   b. Provides that the executive director shall have the same qualifications as the State Public Defender: five years' (minimum) membership in the State Bar and substantial experience in criminal defense.

   C. Allows the center to employ up to 30 attorneys who may be appointed by the Supreme Court to represent capital defendants.

   D. Authorizes employment of investigators for habeas petitions and hearings, and allows contracts with appointed private counsel for use of investigation services.

   E. Authorizes the Supreme Court to raise allowable initial investigation expenses from $12,000 to $25,000 per case.

   F. Directs the center to maintain a roster of qualified private attorneys for appointments in direct appeals and habeas petitions.

   G. Directs the center to provide assistance to appointed attorneys and to review case billings submitted by private attorneys.

   H. Authorizes the center to seek reimbursement from the federal courts for representation of capital habeas petitioners in federal courts.

2. Gives the California Supreme Court discretion to raise the hourly rate in capital appeals and habeas proceedings to at least $125 per allowable hour, based upon established guidelines for complexity of issue and length of record, but also allows the court to pay attorneys on a flat-fee basis (also based upon similar established guidelines).

3. Directs the Judicial Council, and the Supreme Court to establish binding qualifications for attorneys in capital cases.

4. Restricts appointments to the Office of the State Public Defender (OSPD) to direct appeals in capital cases, with exceptions for training or where capital duties have been met.

5. Authorizes the OSPD to hire an additional 15 attorneys and adequate support staff.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT : (Verified 9/11/97)

The Administration
Judicial Council
California State Public defenders Association

ARGUMENTS IN SUPPORT : According to the author's office, "Currently, there are over 150 inmates on death row for whom no counsel has been appointed, either for purposes of the direct appeal or state habeas proceedings. Under existing law, the Office of the State Public Defender or private counsel recruited by the Supreme Court's Automatic Appeals Monitor are assigned death penalty cases. The State Public Defender is currently stretched as far as her budget will allow and many qualified private counsel are unwilling to accept new cases because of the low rate of compensation authorized by the Supreme Court."

RJG:ctl 9/12/97 Senate Floor Analyses
SUPPORT/OPPOSITION: SEE ABOVE
**** END ****